

CALIFORNIA COASTAL COMMISSION

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Commission Action:



CLAIM OF VESTED RIGHTS STAFF REPORT AND RECOMMENDATION

CLAIM NO: 3-04-20-VRC

CLAIMANT: ALISTAIR BLACK

PROJECT LOCATION: Beach and base of coastal bluff seaward of residence at 4440 Opal Cliff Drive in the Opal Cliffs region of the unincorporated Live Oak area of Santa Cruz County (Assessor's Parcel Number 033-151-08).

DEVELOPMENT CLAIMED: Concrete shoreline protective device (seawall) at base of bluff.

FILE DOCUMENTS: 1) Claim of Vested Right, including, among other things, opinion of G.E. Weber, Ph.D., Geological Consultant, dated October 1, 2002, and aerial photographs of site included therewith, 2) Letter from Commission staff to claimant's attorney dated April 14, 2003, and aerial photographic image of site taken in June, 1978, attached thereto, and 3) Letter from claimant's attorney to Commission staff dated August 12, 2003 and supplemental opinion by G.E. Weber dated August 5, 2003, enclosed therewith.

SUMMARY OF STAFF RECOMMENDATION

Staff recommends **denial** of the claim of vested rights. Alistair Black ("claimant") claims a vested right, relieving him of the obligation to which he would otherwise be subject to apply for and obtain a coastal development permit (CDP), for a stepped, concrete seawall constructed at the base of the coastal bluff on claimant's beachfront parcel. To prevail in this claim claimant must demonstrate that the seawall was present at this location prior to February 1, 1973, the effective date of the permitting requirement of the Coastal Zone Conservation Act of 1972 (Proposition 20). To make his case that the

subject seawall satisfies this standard, claimant places principal reliance on a photographic image from the collection of Dr. Gary Griggs, director of the Long Marine Lab at the University of California at Santa Cruz (UCSC). However, staff's interpretation of this photographic image is that there is an alternative explanation for the image of the "seawall" that claimant believes the photo shows, and, moreover, that there are features of the image that tend to undermine the claim. In addition, an independent investigation by staff brought to light an additional aerial photograph from Dr. Griggs' collection taken in June, 1978, that in the opinion of staff shows conclusively the absence of a seawall from the subject site. Claimant does not dispute the staff's interpretation of this 1978 photo, but argues that there is a plausible explanation for what the image shows that is not inconsistent with the subject claim. Specifically, claimant argues that the reason the 1978 photo does not depict the seawall is that the seawall has been obscured by a rock or landslide from the bluff above the seawall. However, this interpretation of the 1978 photo is inconsistent with the configuration of the seawall as shown on later aerial photographic images. For all these reasons, staff recommends that the Commission deny the claimant's vested rights claim for the seawall.

ACTION: Commission Hearing and Vote

STAFF RECOMMENDATION FOR DENIAL OF CLAIM: The Executive Director has made an initial determination that Claim of Vested Rights 3-04-20-VRC has not been substantiated. Staff recommends that the Commission deny Claim of Vested Rights 3-04-20-VRC, and that the claim thus be rejected.

Motion: *"I move that the Commission determine that Claim of Vested Rights 3-04-20-VRC is substantiated and the development described in the claim does not require a Coastal Development Permit."*

Staff recommends a **NO** vote. Failure of the motion will result in a determination by the Commission that the development described in the claim requires a Coastal Development Permit and in the adoption of the resolution and findings set forth below. The motion passes only by an affirmative vote of a majority of the Commissioners present.

Resolution for Denial of Claim:

The Commission hereby determines that Claim of Vested Rights 3-04-20-VRC is not substantiated and adopts the Findings set forth below.

Findings and Declarations

1. Legal Authority and Standard of Review

Section 30608 of the Coastal Act, in relevant part, provides that:

“No person who has obtained a vested right in a development prior to the effective date of this division or who has obtained a permit from the California Coastal Zone Conservation Commission pursuant to the California Coastal Act of 1972 (commenting with Section 27000) shall be required to secure approval for the development pursuant to this division; provided, however, that no substantial change may be made in any such development without prior approval having been obtained under this division.”

The effective date of the division, i.e., the Coastal Act, is January 1, 1976. This site was also subject to the permitting requirements of the Coastal Act’s predecessor statute, the Coastal Zone Conservation Act of 1972 (aka Proposition 20, “the Coastal Initiative”), which went into effect on February 1, 1973. The Coastal Zone Conservation Act required a coastal development permit for new development on this site occurring after February 1, 1973. Thus, the critical date for evaluating this Claim of Vested Rights is February 1, 1973 and this will be referred to as the effective date of the Coastal Act for this site.

Pursuant to Section 30608, if a person obtained a vested right in a development on the subject site prior to the effective date of the Coastal Act, no coastal development permit (CDP) is required for that development. However, no substantial change in the development may be made until obtaining either approval in a coastal development permit, or approval pursuant to another provision of the Coastal Act. In addition, any repair to the development must be conducted in compliance with the Coastal Act section 30610(d) and the regulations at Title 14 California Code of Regulations, section 13252.

The Coastal Act defines “development” as:

“the placement or erection of any solid material or structure; discharge or disposal of any dredged material or of any gaseous, liquid, solid, or thermal waste; grading, removing, dredging, mining, or extraction of any materials; change in the density or intensity of use of land, including but not limited to, subdivision pursuant to the Subdivision Map Act ... change in the intensity of use of water, or of access thereto; construction, reconstruction, demolition, or alteration of the size of any structure,

As used in this section, “structure” includes but is not limited to, any building, road, pipe, flume, conduit, siphon, aqueduct, telephone line, and electrical power transmission and distribution line.” (Coastal Act Section 30106).

The procedural framework for Commission consideration of a claim of vested rights is found in Sections 13200 through 13208 of the Commission's administrative regulations. (Title 14, Division 5.5, California Code of Regulations (CCR)). These regulations require that the staff prepare a written recommendation for the Commission and that the Commission determine, after a public hearing, whether to acknowledge the claim. If the Commission finds that the claimant has a vested right for a specific development or development activity, then the claimant is exempt from coastal development permit requirements for that specific development only. Any changes to the exempt development after February 1, 1973 will require a permit. If the Commission finds that the claimant does not have a vested right for the particular development, then a coastal development permit must be obtained to authorize the development. If a coastal development permit is not obtained, then the development is subject to enforcement action under the Coastal Act to compel its removal.

The Commission must apply certain legal criteria to determine whether a claimant has a vested right for a specific development. These criteria are based on the terms of the Coastal Act and case law interpreting the Coastal Act's vested right provision, as well as common law vested rights claims. The standard of review for determining the validity of a claim of vested rights can be summarized as follows:

1. The development must have been completed by the date on which such development became subject to the permit requirements of the relevant law (in this case by February 1, 1973), or, if work was not completed by said date, the claimant must have performed substantial work and/or incurred substantial liabilities in good faith reliance on the governmental authorization received prior to February 1, 1973. (*Tosh v. California Coastal Commission* (1979) 99 Cal.App. 3d 388, 393; *Avco Community Developers, Inc. v. South Coast Regional Commission* (1976) 17 Cal.3d 785).
2. The claimed development must have received all applicable governmental approvals needed to complete the development prior to February 1, 1973, the effective date of the Coastal Zone Conservation Act of 1972. Typically this would be a building permit, grading permit, Final Map, Health Department approval for a well or septic system, etc. or evidence that no permit was required for the claimed development. (*Billings v. California Coastal Commission* (1988) 103 Cal.App.3d 729, 735).

The burden of proof is on the claimant to substantiate the claim of vested right. (Title 14, California Code of Regulation, Section 13200). If there are any doubts regarding the meaning or extent of the vested rights exemption, they should be resolved against the person seeking the exemption. (*Urban Renewal Agency v. California Coastal Zone Conservation Commission* (1975) 15 Cal.3d 577, 588).

A narrow, as opposed to expansive, view of vested rights should be adopted to avoid seriously impairing the government's right to control land use policy. (*Charles A. Pratt Construction Co. v. California Coastal Commission* (1982) 128 Cal.App.3d 830, 844, citing, *Avco v. South Coast Regional Commission* (1976) 17 Cal.3d 785, 797). In evaluating a claimed vested right to maintain a nonconforming use (i.e., a use that fails to conform to current zoning), courts "follow a strict policy against extension or expansion of those uses." (*Hansen Bros. Enterprises v. Board of Supervisors* (1996) 12 Cal.4th 533, 568; *County of San Diego v. McClurken* (1957) 37 Cal.2d 683, 687).

The following vested rights analysis is based on information submitted by the claimant and supplemental Commission staff research or official Commission records.

2. Location, Description, and Background Regarding Property

The property on which the development that is the subject of the claim for vested rights (CVR) is located is at 4440 Opal Cliff Drive in an area of coastal Live Oak in unincorporated Santa Cruz County known as Opal Cliffs.¹ (**Exhibits 1, 2**) Opal Cliffs is the name for the area extending roughly from 41st Avenue to the City of Capitola city limits. This stretch of coastline is characterized by a row of private residential properties that are perched atop the bluffs located seaward of the first through public road (Opal Cliff Drive) from the sea. As a result, seaward public views and access from Opal Cliff Drive to the shoreline have been extremely curtailed. In addition, the base of Opal Cliff bluffs are almost continually armored (by rip-rap, seawalls, and other such structures) that significantly reduce the amount of beach area available for public use and enjoyment.

In 2001 Santa Cruz County granted to claimant and to claimant's immediate upcoast neighbor (4420 Opal Cliff Dr.) two coastal development permits (CDPs) for a "150 linear foot shotcrete shoreline protective structure on the upper 25 feet of bluff spanning the two subject properties equally." These CDPs were appealed to the Commission, and, on March 7, 2002, the Commission, on de novo review (Appeal Nos. A-3-SCO-01-117, 118), denied CDPs for the development that the County had approved. In doing so the Commission adopted findings that include the following observation:

As previously stated, there exists rip-rap (Banman) and rip-rap/concrete seawalls (Black) at the base of the bluffs at this location. The Commission has been unable to locate any coastal development permits authorizing the installation of the existing armoring, and pre-Coastal Act photo interpretation (to verify whether the armoring was placed prior to coastal permitting requirements) has proven

¹ The Commission's processing of this CVR is based on the assumption that the subject development is located on land owned by the claimant. However, property boundaries at the shoreline of the Pacific Ocean are dynamic in character (see *Lechusa Villas West v. Cal. Coastal Comm'n* (1997) 60 Cal.App.4th 218, cert. den. 119 S.Ct. 163) and thus, at least at certain times of the year, the seawall may be located on publicly-owned tide or submerged lands. Nothing in this proceeding should be interpreted as constituting a waiver of any future assertion by the State of California of a proprietary interest in the land on which the subject seawall is located.

inconclusive. The County findings do not examine this point. Since large amounts of shoreline armor in coastal Live Oak were originally placed in the 1950s and 1960s, it may be that the existing armor at this location pre-dates the Coastal Act. In fact, the Applicant indicates that the armoring was originally installed in the early 1960s. In any case, since its installation date has not been verified, the status of the existing armoring remains partially clouded as of the date of this report.

In his CVR, the claimant describes the concrete seawall that is the subject of the claim as follows:

The wall [that is the subject of the claim] consists of 3x3x3-foot blocks tightly stacked over and around rip/rap held together by concrete. It is estimated that each block weighs approximately 2 tons. Each block has a hook made of bent steel bars that were clearly installed for the purpose of using a crane to move them and stack them.

The claimant goes on to state:

Approximately 2/3 of the wall is under discussion [i.e., is the subject of the CVR] and is that portion on Lot 32 (Black) which extends approximately 40 feet from the Black-Lincoln property boundary into [claimant's] property. Approximately 1/3 of the wall is on Mr. Lincoln's [downcoast] property.²

3. Analysis of Claim of Vested Rights

The claimant has submitted a Claim of Vested Rights (CVR) that purports to substantiate the claim that the subject concrete seawall was constructed prior to February 1, 1973. **(Exhibits 3, 4)** The CVR places principal reliance on an analysis by G.E. Weber, Ph.D., the claimant's geological consultant, of aerial photography of the site of the claimant's property. In light of the dispositive significance of the date of February 1, 1973, in his analysis Dr. Weber places particular emphasis on any photographic images of the claimant's property that were taken prior to that date that in his opinion show the presence of the seawall. Conversely, in staff's opinion equal significance deserves to be accorded to post-February 1, 1973 aerial photographic images, particularly any such images that depict the claimant's property without the seawall. In accordance with (14 CCR) section 13203 of the Commission's administrative regulations, the following paragraphs set forth 1) evidence advanced by claimant in support of his claim, 2) staff's response to the claimant's evidence, 3) evidence in opposition to the subject CVR, 4) claimant's response to opposing evidence, and 5) staff's analysis of claimant's response to opposing evidence.

² In 1985 the Commission granted CDP No. 3-83-176-A2 for the portion of the seawall on property (4460 Opal Cliff Dr.) immediately downcoast from the subject site

a. Evidence Presented by Claimant and Staff Response.

i. **The 1972 Aerial Photograph.** In support of his CVR the claimant has submitted to the Commission pre-February 1, 1973, aerial photographic imagery taken of his property in the years 1967, 1969, and 1972 (2 images). In his CVR the claimant acknowledges that the images taken in 1967 and 1969 “show a vacant lot at my property *without a [sea]wall at the bottom of the cliff....*” (Emphasis added.) One of the two 1972 photographic images (taken in September, 1972, by the Department of Boating and Waterways) is simply inconclusive with regard to the presence or not of the subject seawall. Accordingly the claimant does not rely upon it.

Therefore, the only pre-February 1, 1973, photographic image that claimant has identified that according to the claimant shows the subject seawall on the claimant’s property is that taken by Dr. Gary Griggs, Director of the Long Marine Laboratory at the University of California at Santa Cruz (UCSC) in November or December, 1972.

According to G.E. Weber, Ph.D., the claimant’s geological consultant:

*A simple comparison of the [December, 1972] photograph [with a 2002 photograph from approximately the same angle taken by Dr. Weber] reveals a **linear** white mass at the base of the seacliff that has the same **shape**, color and appearance as the seawall in the July 2002 photograph. **This mass is clearly not a portion of the seacliff, as indicated by its shape and position.** Therefore, I conclude, with virtual certainty that the seawall on the subject property was built...prior to January 1, 1973.*

...

*...during my evaluation I took into consideration that this **linear** white mass...might be a shore platform, **part of the seacliff**, or simply rubble at the base of the cliff. Based on its position in respect to the cliff face, the rip-rap on the beach and the cliff to the northeast it is clear that it is none of these.*
(Emphasis added.)

ii. **Staff Response to Claimant’s Evidence.** Staff agrees that current aerial photographic images of the coastal bluff on the claimant’s property show that the seawall at the base of that bluff is characterized by sharply delineated horizontal lines is thus is consummately “linear” in shape. However, the “white mass” shown on the 1972 photographic image is characterized by highly irregular and uneven margins that contrast dramatically with the regular and even horizontal margins of the seawall as shown in the 2002 photograph. Thus, contrary to the findings of Dr. Weber, the “white mass” shown in the 1972 image has a shape that is decidedly “nonlinear” in character. In addition, staff believes that a careful examination of the two photographs reveals that the “white mass” in the 1972 image is located in a different position relative to the cliff face than is the seawall in the contemporary image. Accordingly, in staff’s view a much more likely interpretation of the “white mass” depicted in the 1972 image is that it is an outcropping of “Purisima Formation” bedrock. This interpretation finds support in the

outcroppings on this bedrock material that appear in the photographic images on neighboring properties at approximately the same elevation in the cliff face as the “white mass” shown in the 1972 photograph.

iii. Sworn Statement by Mary Lee Lincoln. The claimant has also included in his CVR a sworn statement by Mary Lee Lincoln. Ms. Lincoln identifies herself as “the daughter-in-law of Robert and Fay Lincoln” owners of adjacent property at 4460 Opal Cliff Dr. In her statement Ms. Lincoln states that “prior to a house being constructed on...4440 Opal Cliff Dr.” she observed “a large crane...lowering over the cliff, large concrete blocks...” In her statement Ms. Lincoln notes that the recollection stated therein is of “an event that occurred over thirty years ago.”

iv. Staff Response to Claimant’s Evidence. As noted in the sworn statement, the recollection contained therein is of an event that occurred “over thirty years ago,” a period of time over which the reliability of anyone’s memory can not unreasonably be questioned. Moreover, in staff’s view this uncorroborated recollection is clearly outweighed by the much more compelling photographic evidence hereinafter discussed.

b. Evidence In Opposition to Claim, Claimant’s Response to Unfavorable Evidence, and Staff Analysis of Claimant’s Response.

i. The 1978 Aerial Photograph. Upon receipt of the subject CVR staff undertook an independent investigation of aerial photographic depictions of the beach and base of bluff at the claimant’s property. Staff’s investigation led it to the same collection of aerial photography that Dr. Weber utilized in performing his investigation, namely, that of Dr. Gary Griggs.³ When staff investigated Dr. Griggs’ collection it discovered a aerial photograph taken in June, 1978, that Dr. Weber had apparently overlooked in his investigation. The significance of this photographic image is that in it the seawall is completely absent from its location at the base of the bluff where it appears in later photographs. If this 1978 photographic image is taken at face value for what it appears to show, namely, the absence of any seawall on the claimant’s property, it is fatal to the claimant’s CVR because it means that the seawall was constructed sometime after 1978.

ii. Claimant’s Response to Unfavorable Evidence. After staff called the claimant’s attention to the 1978 photograph (**Exhibit 5**), Dr. Weber, the claimant’s geological consultant, prepared a supplemental analysis dated August 5, 2003 (**Exhibit 6**). In his supplemental analysis Dr. Weber concludes that, contrary to what would appear to be the case from an examination of the 1978 photographic image, “the wall is present, but covered with earth from a small earth fall off the cliff face.”⁴

³ Dr. Griggs has an extensive collection of historical aerial photography of the Santa Cruz County coastline.

⁴ Elsewhere in his supplemental report Dr. Weber expresses the view that “the sea wall is [only] *partly* buried by an earth fall in the 1978 oblique photo of Griggs.” (Emphasis added.) If the seawall is only “partly” buried then the part that is not buried should be visible in the image. No such “unburied” portion of the seawall is apparent in the 1978 photograph.

Claimant also, at least by inference, raises questions regarding the accuracy of what the 1978 oblique photograph appears to depict by repeated assertions that the seawall is visible on pre-1978 (but post-February 1, 1973) aerial photographs. In other words, if the seawall is present in pre-1978 photographs it is highly unlikely that it is not be present when the 1978 photograph was taken. For example, in his CVR the claimant asserts unreservedly that “the wall is completely visible in the 1975 pair [of photographs, identified by Dr. Weber as “SCZCO 1-1, 1-2”] (under stereo magnifier).” In his supplemental (but not in his original) report, Dr. Weber states that on the basis of his interpretation of these 1975 photographs “my level of certainty [as to the presence of the seawall in the photograph] is greater than 90%.” Similarly, in his initial report Dr. Weber analyzes vertical photographs of the subject site taken in 1973 (identified by Dr. Weber as “Big Creek Lumber 7-1, 7-2, 8-1, and 8-2”) and concludes that “[Despite] relatively poor resolution and scale,...with about 75-80% certainty I believe these photographs...show a sea wall at the base of the seacliff on the subject property.”

iii. Staff Analysis of Claimant’s Response to Unfavorable Evidence. Staff concurs with Dr. Weber that a small earth fall can be identified on the 1978 photograph. However, such an observation leaves unanswered the critical question of whether the “earth fall” that is apparent in the 1978 photograph is of sufficient magnitude to completely cover and obscure from sight a structure of a size and bulk as that of the subject seawall. For the following reasons, staff believes this question must be answered in the negative. Dr. Weber’s supplemental report prompted staff to compare the 1978 photograph with later photographs in which the seawall is clearly present on the claimant’s property. Staff found an oblique aerial photographic image of the claimant’s property taken in the summer of 1987 as part of a joint undertaking by the Dept. of Water Resources and the Commission to be particularly instructive as a basis of comparison with the 1978 photograph. Such a comparison reveals convincingly that, given the configuration of the seawall as shown in the 1987 photographic image, if the seawall were present on the claimant’s property in 1978 it would clearly project beyond the furthest downcoast extent of the earth fall and thus to that extent would be visible in the 1978 photograph. Since it is not visible to this extent, it is clear that the seawall is not present in the 1978 photograph.

With respect to the 1973 and 1975 photographs that Dr. Weber interprets in his reports, staff notes that, in contrast to the 1972, 1978, and 1986 photographs discussed above, these photographs 1) are vertical rather than oblique images of the property, and 2) are of a much lower scale and resolution, as noted by Dr. Weber himself. Staff has carefully examined the 1973 and 1975 photographs and can find in them no persuasive evidence of the presence of the seawall on claimant’s property sufficient to cast doubt on the accuracy of the 1978 photograph.

CONCLUSION

For all the reasons set forth above, the Commission finds that Alistair Black has not met the burden of proving its claim of vested rights for a concrete seawall at the beach and bluffs seaward of the residence at 4440 Opal Cliff Drive, Santa Cruz County. This is not a determination of whether, ultimately, a seawall or other shoreline protective device can be allowed on the site, although the findings in Appeal Nos. A-3-SCO-01-117, 118, in which the Commission denied on appeal a shoreline protective structure on the upper bluff at this site, makes it unlikely that a seawall or other shoreline protective device can be allowed at the site at this time. Rather, the decision to deny the claim of vested rights means only that the development that is the subject of the claim is unauthorized unless and until the claimant goes through the permitting process under the Coastal Act, and is granted a CDP for it.